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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF ARIZONA,

Petitioner,

v.

CHRISTOPHER R. BURKETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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QUESTION PRESENTED

Does the guarantee of speedy trial found in the Sixth Amendment to the United States Constitution apply after conviction and through sentencing?

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STATE OF ARIZONA,

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v.

CHRISTOPHER R. BURKETT,

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PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

Petitioner, the State of Arizona, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Arizona Court of Appeals.

OPINIONS BELOW

The reported opinion of the Arizona Court of Appeals, State v. Burkett, ___ Ariz. ___, 876 P.2d 1144 (App. 1993), is

reproduced in Appendix A.

The August 1, 1994 Order of the Arizona Supreme Court denying the State's Petition for Review of the decision of the Arizona Court of Appeals is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The order of the Arizona Supreme Court denying the State's Petition for Review was issued on August 1, 1994. This petition is filed within 90 days of that judgment as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

> jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner, the State of Arizona, charged Respondent Christopher R. Burkett with certain offenses. On May 4, 1987, Burkett pleaded guilty to two counts of burglary, class 4 felonies. He became a fugitive prior to sentencing and his whereabouts remained unknown to Arizona authorities until March 1989, when they learned that Burkett was in custody in New York City on unrelated charges. The Sheriff

of Maricopa County, Arizona wrote to the New York City Police Department and asked that Burkett be held until he could be brought back to Arizona.

In August, 1989, Burkett wrote to the Clerk of the Superior Court in Maricopa County, asking if he could be sentenced in Maricopa County and have his Arizona sentences run concurrently with his New York sentence. In May, 1990, a Maricopa County deputy county attorney wrote to Burkett stating that the Interstate Agreement on Detainers [hereinafter "IAD"] did not apply to Burkett's situation, since he was not subject to any untried charges, and that Burkett could not be sentenced in absentia.[1]

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[1]Rule 26.9, Arizona Rules of Criminal Procedure, provides:

> The defendant is entitled to be present at a presentencing

Burkett completed his New York sentence in July 1991 and was extradited to Arizona the following month. Upon his return Burkett filed a motion to dismiss the indictment to which he had pled guilty, arguing, **inter alia**, that the State's failure to act on his request for prompt sentencing violated Federal and State constitutional provisions mandating a speedy trial. The trial court found that dismissal was required on other grounds[2] and did not address Burkett's constitutional claim.

The State filed a notice of appeal. On September 16, 1993, the Arizona Court of Appeals, Division One, held that the trial court had erred in dismissing the charges on the grounds cited. However, the Court

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hearing and shall be present at sentencing.

[2]The trial court found that the State had violated the IAD and the Arizona speedy trial rule, Rule 8.3(a), Ariz. R. Crim. P.

of Appeals addressed the constitutional claim Burkett had raised, and held that the Sixth Amendment right to speedy trial applies through sentencing. The Court of Appeals reversed the trial court's order dismissing the indictment and remanded the case to the trial court, with directions to consider Burkett's claim that his constitutional right to a speedy trial was violated under the four-part test articulated in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). The State filed a timely petition for review by the Arizona Supreme Court; that Court denied the petition for review on August 1, 1994.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for writ of certiorari because the Arizona Court of Appeals has ruled upon a question of Sixth Amendment jurisprudence that has never been finally determined by any decision

of this Court, namely, whether the Sixth Amendment right to speedy trial applies through sentencing.

In Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 485-86, 1 L.Ed.2d 393 (1957), Pollard argued that the delay between his conviction and sentence violated his Sixth Amendment speedy trial rights. This Court stated "We will assume **arguendo** that sentence is part of the trial for purposes of the Sixth Amendment." Having made that assumption for the sake of argument in Pollard's case, this Court went on to find that even if the Sixth Amendment right to speedy trial applied to sentencing, any postconviction delay in that case did not violate the Sixth Amendment or Rule 32(a) of the Federal Rules of Criminal Procedure. This Court has never directly addressed or decided the question whether sentence is part of the trial for purposes of the Speedy

Trial clause of the Sixth Amendment.

Based on this Court's statement in Pollard, supra, the United States courts of appeal have "either treated the subject as established law or have perpetuated the Court's assumption in Pollard." Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986), and see cases cited therein. But none of these cases give any reasoning for their holdings that the speedy trial right applies through sentencing, other than to cite Pollard. Instead, these cases have seized on this Court's assumption **arguendo** in Pollard, supra, as though it were established law. The case law has thus piled assumption upon assumption, without ever deciding the true merits of the issue.

At least three state courts of last resort have specifically held that sentence is not part of the trial for purposes of speedy trial analysis. State v. Drake,

259 N.W.2d 862 (Iowa 1977); State v. Johnson, 363 So.2d 458 (La. 1978); State v. Jameson, 224 Neb. 38, 395 N.W.2d 744 (1986). These state courts have based their analysis on the words of the Sixth Amendment referring to "a speedy and public trial, by an impartial jury" and the rights to confront witnesses and secure their presence by compulsory process. The language of the Sixth Amendment does not refer to sentencing, nor is it relevant to sentencing. The Sixth Amendment confers the right to a speedy trial by jury, that is, "A trial in which the issues of fact are to be determined by the verdict of a jury, duly selected, impaneled, and sworn." Black's Law Dictionary, Sixth Ed., at 1505. The term "trial" has been defined as "the proceedings to determine a defendant's guilt or innocence, commencing with the empaneling of the jury and ending with a rendition of

the verdict." State v. Johnson, 363 So.2d 458, 461 (La. 1978). "Trial" is the part of the prosecution in which a tribunal examines the evidence presented to determine the guilt or innocence of the accused. Logue v. State, 386 A.2d 780, 282 Md.App. 625 (1978). Indeed, as the Arizona Court of Appeals recognized, for purposes of the IAD the sentence is not part of the trial. State of Arizona v. Burkett, Appendix A. See also Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985); United States v. Coffman, 905 F.2d 330 (10th Cir. 1990).

This Court has identified three purposes that the speedy trial right was designed to serve for criminal defendants: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. Barker

v. Wingo, 407 U.S. 514, 533, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972), citing United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966) and Smith v. Hooey, 393 U.S. 374, 377-378, 89 S.Ct. 575, 576-577, 21 L.Ed.2d 607 (1969). These speedy trial issues address the interests that accused defendants have at the **pretrial** and **trial** stages of the proceedings, not the interests defendants have after their guilt has been conclusively established, either by means of a trial or through a guilty plea. The interest in preventing pretrial incarceration, of course, is explicitly limited to pretrial stages of a proceeding. The possibility that the defense will be impaired is also a pretrial issue: Delay may mean that the defendant loses the opportunity to present evidence for the defense at the trial stage. As to the interest in "minimizing anxiety and

concern of the accused," a convicted defendant is no longer merely "accused" of a crime, but is guilty beyond a reasonable doubt. The position of a presumptively innocent accused defendant is quite different from that of a person whose guilt has been established:

> [W]hen the Barker court talked in terms of anxiety and concern of the accused, it was referring to a presumptively innocent defendant who must exist under a cloud of suspicion and uncertainty. See Klopfer v. State of North Carolina, [386 U.S. 213,] at 222, 87 S.Ct. 988 [, 18 L.Ed.2d 1] [(1967)]. But when the defendant is found guilty his presumption of innocence dissipates. While he awaits sentencing he may still be under a cloud, but it is not a cloud of "public accusation", Klopfer, supra, but a cloud of public guilt generated by a finding beyond a reasonable

> doubt that he did commit the wrongs alleged. See [People v.] Valdespino, [15 Cal.App.3d 207, 93 Cal.Rptr. 142 (1971)]. The major concerns of the speedy trial guarantee either do not apply after conviction or are of only speculative moment.

Erbe v. State, 276 Md. 541, ___, 350 A.2d 640, 648 (1976), quoting Erbe v. State, 25 Md.App. 375, ___, 336 A.2d 129, 136 (1975). The uncertainty resulting from untried charges is far greater than the uncertainty caused by a delay in sentencing. See United States v. Coffman, 905 F.2d 330 (10th Cir. 1990).

In Burkett's case, the Arizona Court of Appeals has extended the Sixth Amendment right to speedy trial to provide a right to "speedy sentence" without any analysis or justification, and without any decision by this Court for guidance. This Court has

never decided whether there is a Sixth Amendment right to "speedy sentence." This Court should clarify whether or not such a right exists to settle the differences between the state courts and the United States courts of appeal.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Arizona Court of Appeals.

Respectfully submitted,

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October 31, 1994

APPENDIX

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APPENDIX A:

Reported opinion of the Arizona Court of Appeals, State v. Burkett, ___ Ariz. ___, 876 P.2d 1144 (1993).

APPENDIX B:

August 1, 1994 Order of the Arizona Supreme Court denying review of the decision of the Arizona Court of Appeals in State v. Burkett.

APPENDIX A

STATE OF ARIZONA,

v.

CHRISTOPHER R. BURKETT.

Court of Appeals of Arizona, Division One.

September 16, 1993.

NOYES, Judge.

We hold that the Interstate Agreement on Detainers (IAD), found in Ariz. Rev. Stat. Ann. (A.R.S.) section 31-481 (1986), does not apply to a sentencing detainer and neither does Rule 8.3(a) of the Arizona Rules of Criminal Procedure (Rule). We reverse the trial court, which had granted Defendant's motion to dismiss the indictment on grounds that the State's

delay in having Defendant returned to Arizona for sentencing violated both the IAD and Rule 8.3(a). Because Defendant's motion to dismiss raised a constitutional speedy trial issue that the trial court's ruling did not address, we remand for consideration of that issue.

I.

On May 4, 1987, Christopher R. Burkett (Defendant) pled guilty to two counts of third-degree burglary, class four felonies. He became a fugitive prior to sentencing, and his whereabouts remained unknown to Arizona authorities until March 1989, when they learned that Defendant was in custody on other charges in New York City. The sheriff of Maricopa County wrote the New York City Police Department and asked that Defendant be held until he could be brought back to Arizona.

Some months later, in August 1989, Defendant wrote to the Clerk of the Superior Court in Maricopa County. In the letter, Defendant noted that he was serving a two to four year prison sentence in New York, and he inquired: "I'm presently interested in knowing if I can be sentenced there in Maricopa County and have the charges to run currently with my New York State sentence." The next event reflected in the record is that in May 1990, a Maricopa County deputy county attorney wrote Defendant, apparently in response to another letter from Defendant, and advised that the IAD did not apply to Defendant's "situation." The letter also advised that: "We cannot accommodate your request to be sentenced in absentia to have a sentence run concurrent."

In July 1991, Defendant completed his New York sentence. The following month,

he was extradited to Arizona. On return to Arizona, Defendant filed a motion to dismiss the indictment, alleging that the State's failure to act on his request for prompt sentencing violated the IAD, Rule 8.3(a), and constitutional provisions mandating a speedy trial. See U.S. Const. amend. VI; Ariz. Const. art. II, § 24. The trial court concluded that the State's action violated both the IAD and Rule 8.3(a). The court also determined that, because the State had misadvised Defendant regarding the applicability of the IAD, Defendant's failure to strictly comply with that statute was excused. Therefore, the trial court found that dismissal was required under both the IAD and Rule 8.3(a). The court did not address Defendant's constitutional claims. The State filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S.

sections 13-4031 (1989) and -4032(1) (Supp. 1992).

II.

The application of the IAD and Rule 8.3(a) are issues of law that we review de novo. See, e.g., State v. Angelo, 166 Ariz. 24, 26, 800 P.2d 11, 13 (App. 1990) (meaning of statute reviewed de novo on appeal).

A.

The IAD is an intergovernmental compact signed by the United States and forty-eight states, including Arizona and New York. See 11 Uniform Laws Annotated 225 (Supp. 1993) (listing jurisdictions); Fex v. Michigan ___ U.S. ___, ___, 113 S.Ct. 1085, 1087, 122 L.Ed.2d 406 (1993). Federal law governs interpretation of the IAD. Carchman v. Nash, 473 U.S. 716, 719, 105 S.Ct. 3401, 3403, 87 L.Ed.2d 516 (1985); see also ASARCO, Inc. v. Kadish,

490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989) (state court has authority "to render binding judicial decisions that rest on their own interpretations of federal laws").

A "detainer" is "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent." Fex, ___ U.S. at ___, 113 S.Ct. at 1087.

In pertinent part, Article III of the IAD provides:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state <u>any untried indictment information or complaint on the basis of which a detainer has been lodged</u>

> against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

A.R.S. § 31-481 (emphasis added).

B.

Nearly all jurisdictions that have considered whether the IAD applies to sentencing detainers have concluded that it does not. The trial court followed the minority view, the lead case for which is Tinghitella v. California, 718 F.2d 308 (9th Cir. 1983). We customarily find Ninth Circuit authority persuasive on a federal question. In this case, however, we conclude that a more recent United States Supreme Court opinion and other persuasive authority, discussed below,

compel the conclusion that the IAD does not apply to sentencing detainers.

The following cases hold that the IAD does not apply to sentencing detainers: Moody v. Corsentino, 843 P.2d 1355, 1367-72 (Colo. 1993); State v. Barefield, 110 Wash.2d 728, 756 P.2d 731, 733-34 (1988); State v. Sparks, 104 N.M. 62, 64-66, 716 P.2d 253, 255-57 (App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986); State v. Barnes, 14 Ohio App.3d 351, 471 N.E.2d 514, 516 (Ohio 1984); People v. Castoe, 86 Cal.App.3d 484, 150 Cal.Rptr. 237, 239-40 (1978); People v. Randolph, 85 Misc.2d 1022, 381 N.Y.S.2d 192, 194 (1976); see also Hernandez v. United States, 527 F.Supp. 83, 85 (W.D. Okla. 1981) (by its terms, IAD "applies only to detainers based upon untried indictments, informations or complaints").

Some courts have said, in narrower

holdings, that the term "trial" as used in the IAD does not include sentencing. See United States v. Coffman, 905 F.2d 330, 332-33 (10th Cir. 1990); People v. Barnes, 93 Mich.App. 509, 287 N.W.2d 282, 283-84 (1979); see also State v. Lewis, 422 N.W.2d 768, 771 (Minn.App. 1988) (term "trial" throughout IAD does not include sentencing).

In dismissing the indictment in this case, the trial court relied on Tinghitella and on the one case in the country that has explicitly followed it regarding application of the IAD to sentencing detainers, Hall v. Florida, 678 F.Supp. 858 (M.D.Fla. 1987).[1]

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[1]Two intermediate appellate state courts in the Ninth Circuit did follow Tinghitella, but briefly. People v. Fischer, 188 Cal.App.3d 1079, 234 Cal. Rptr. 16, 19-20 (1987) cited Tinghitella in holding that the IAD applied to sentencing detainers. The California Supreme Court, however, ordered that this

The Tinghitella court gave two main reasons for its holding: (1) the term "trial" in the sixth amendment's "speedy trial" clause has been interpreted to include sentencing and (2) the policies behind the IAD of reducing the "uncertainties" accompanying detainers would be furthered by liberally construing "trial" in Article III of the IAD. See 718 F.2d at 31. The Hall court employed

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opinion be de-published. State v. Barefield, 47 Wash.App. 444, 735 P.2d 1339, 1343-44 (1987), followed Tinghitella in holding that the IAD applied to sentencing detainers. However, the Washington Supreme Court, in State v. Barefield, 110 Wash.2d 728, 756 P.2d 731 (1988), held that the IAD does not apply to sentencing detainers. But see Cross v. Meisel, 720 F.Supp. 486, 489 (E.D.Pa. 1989) (indicated in dicta that plaintiff, who was the losing party in a § 1983 action, might be entitled to relief for an IAD violation based on Tinghitella); Walker v. King, 448 F.Supp. 580, 587 (S.D.N.Y. 1978) (preceded Tinghitella and stated that use of the terms "trial" and "final disposition" in the IAD includes sentencing).

similar reasoning. See 678 F.Supp. at 862. We do not find these reasons persuasive in light of the United States Supreme Court opinion in Carchman.

The Court in Carchman concluded from the plain language and legislative history of the IAD that it applied to "criminal charges"; it did not apply to a probation violation detainer based on a new conviction. See 473 U.S. at 734, 105 S.Ct. at 3410. The Supreme Court stated: "Article III by its terms applies to detainers based on 'any untried indictment, information or complaint.' The most natural interpretation of the words 'indictment,' 'information,' and 'complaint' is that they refer to documents charging an individual with having committed a criminal offense." Id. at 724, 105 S.Ct. at 3405. The Court also found significant Article III's reference

to "untried" criminal charges, and its requirement that a prisoner "shall be brought to trial within 180 days." Id. at 724, 105 S.Ct. at 3405. Obviously, if the accused has been convicted, the underlying charges are not "untried."

The concerns addressed by the IAD are not applicable to post-conviction detainers. The Court in Carchman noted:

> Adoption of the [IAD] was motivated in part by a practice of filing detainers based on untried criminal charges that had little basis. These detainers often would be withdrawn shortly before the prisoner was released. Even though unsubstantiated, the detainers would have a detrimental effect on the prisoner's treatment. Article III enables a prisoner to require the State lodging the detainer either to drop the charge and resulting detainer or to bring the prisoner to trial. In this way, the prisoner can clear his record of detainers based on unsubstantiated charges.

Id. at 729-30, 105 S.Ct. at 3408-09 (footnotes omitted). The Court found that a probation-violation charge based on

convictions for new crimes was "conclusively established," not unsubstantiated; therefore, the abuses that motivated the IAD's adoption were not present. Id. at 731, 105 S.Ct. at 3409. We find that the same rationale applies to sentencing detainers; they too are based on "conclusively established" charges, not on "untried" charges.

We agree with the analysis provided by the New Mexico Court of Appeals in explaining its conclusions that the IAD does not apply to sentencing detainers and that Tinghitella has been limited by the Supreme Court's later pronouncement in Carchman:

> In our case, as in the probation revocation situation, defendant has already been prosecuted. He already has pled guilty to three fourth-degree felonies. He, therefore, has been brought to trial. We conclude that the detainer in this case was not based on any untried indictment, information, or complaint

under the IAD. See Carchman.

> . . . [W]e find that the policy considerations which prompted the creation and adoption of the IAD are not present here. Defendant's situation is not a condition which the IAD was designed to remedy.
>
> . . . .
>
> As in the case of the probation violation detainer in Carchman, however, the fear of filing meritless detainers is not present here. A sound basis supported the filing of this detainer. Defendant here had been convicted and he had failed to appear for sentencing. The detainer, therefore, was unquestionably legitimate.
>
> Additionally, the uncertainties which confront a prisoner who has a detainer based on an outstanding indictment, information or complaint are much graver than those arising from an outstanding sentence. In the case of a prisoner affected by a detainer on an untried charge, invocation of the IAD procedures may result in a not guilty verdict totally displacing the detainer. Whereas, in our case, defendant is certain that he has been convicted of three felony

offenses.

Sparks, 104 N.M. at 65-66, 716 P.2d at 256-57.

We hold that the IAD does not apply to sentencing detainers. We conclude that the trial court erred in determining that the IAD applied to Defendant's request for sentencing.

III.

The trial court also based its dismissal on a violation of Rule 8.3, which provides:

> **a. Persons Without the State.** Within 90 days after receipt of a written request from any person charged with a crime and incarcerated without the state, or within a reasonable time after otherwise learning of such person's incarceration without the state, the prosecutor shall take action as required by law to obtain such person's presence for trial. Within 90 days after the defendant has been delivered into the temporary custody of the appropriate authority of this state, he shall be brought to trial.

Ariz.R.Crim.P. 8.3(a).

Rule 8.3(a) is intended to supplement the IAD. See State v. Loera, 165 Ariz. 543, 545, 799 P.2d 884, 886 (App. 1990); State v. Olson, 146 Ariz. 336, 338, 705 P.2d 1387, 1389 (App. 1985). "It is the Arizona speedy trial provision applicable to persons in prison 'without the state.'" Loera, 165 Ariz. at 545, 799 P.2d at 886. Rule 8.3(a)'s express reference to obtaining a defendant's presence for "trial," compels the conclusion that the rule, like the IAD itself, does not apply to Defendant's request for sentencing.

We hold that Rule 8.3 does not apply to sentencing detainers. We conclude that the trial court erred in determining that Rule 8.3 applied to Defendant's request for sentencing.

IV.

A.

Defendant claimed in the trial court that his constitutional right to a speedy trial was denied by the delay following his request for sentencing. See U.S. Const. amend. VI; Ariz. Const. art. II, § 24. The trial court did not address this claim, and it appears to be a colorable claim that should be addressed on remand.

Although the Supreme Court has never expressly decided whether the right to a speedy trial applies through the sentencing stage of the proceedings, in Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 485, 1 L.Ed.2d 393, (1957), the Court was presented with the issue and assumed arguendo that the "sentence is part of the trial for purposes of the Sixth Amendment."

Other courts have assumed or

specifically held that the speedy trial guarantee applies through sentencing. See United States v. Martinez, 837 F.2d 861, 866 (9th Cir. 1988); Burkett v. Cunningham (Burkett I), 826 F.2d 1208, 1220 (3rd Cir. 1987); Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir.), cert. denied, 479 U.S. 936, 107 S.Ct. 413, 93 L.Ed.2d 364 (1986); Tinghitella, 718 F.2d at 312-13; United States v. Merrival, 600 F.2d 717, 720 (8th Cir. 1979); United States v. Howard, 577 F.2d 269, 270 (5th Cir. 1978); Brady v. Superintendent, 443 F.2d 1307, 1310 (4th Cir. 1971); United States v. Tortorello, 391 F.2d 587, 589 (2d Cir. 1968); Welsh v. United States, 348 F.2d 885, 887 (6th Cir. 1965); Moody v. Corsentino, 843 P.2d 1355, 1363-67 (Colo. 1993); State v. Cunningham, 405 A.2d 706, 709-10 (Del. 1979); Gonzales v. State, 582 P.2d 630, 632 (Alaska 1978); Erbe v. State, 276 Md. 541, 350 A.2d 640,

642 (1976); State v. Fennell, 218 Kan. 170, 542 P.2d 686, 694 (1975); but see State v. Johnson, 363 So.2d 458, 460 (La. 1978) (sixth amendment does not apply to delay between conviction and sentencing).

The Arizona Supreme Court has never clearly applied the sixth amendment to a delay between conviction and sentencing, but there have been suggestions to that effect. In State v. Steelman, 126 Ariz. 19, 612 P.2d 475, cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), the court considered the lapse of nearly four years between the defendant's first capital sentencing hearing and a second hearing ordered after an appeal. The court noted that the issue of whether "the Sixth Amendment speedy trial guarantee includes the right to prompt sentencing" has not been decided by the United States or the Arizona Supreme Court. Id. at 22,

612 P.2d at 478. The court continued: "If such a rule were adopted, however, it would follow that the defendant would have to show some prejudice before being able to obtain any relief." Id. The court, though, found no prejudice in the delay. Id.

In State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982), our supreme court addressed a similar delay between capital sentencing hearings. Citing Steelman, the court stated: "Neither this court nor the United States Supreme Court has found that the right to a speedy trial extends to sentencing." Blazak, 131 Ariz. at 600, 643 P.2d at 696. Despite this disclaimer, the court, as in Steelman, determined that the defendant had not been prejudiced by the delay. Id. at 600-01, 643 P.2d at 696-97.

B.

In light of the foregoing authorities, we hold that the guarantees to speedy trial, found in the sixth amendment of the United States Constitution and article two, section twenty-four of the Arizona Constitution, apply through sentencing. The framework for analyzing the delay between conviction and sentencing is the four-part test articulated in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). See Burkett v. Fulcomer (Burkett II), 951 F.2d 1431, 1438 (3rd Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 3055, 120 L.Ed.2d 921 (1992); Martinez, 837 F.2d at 867; Burkett I, 826 F.2d at 1219; Perez, 793 F.2d at 253-54; United States v. Williams, 782 F.2d 1462, 1465 (9th Cir. 1985); see also State v. Schaaf, 169 Ariz. 323, 327, 819 P.2d 909,

913 (1991) (Arizona Supreme Court applies the standard found in Barker v. Wingo to analyze a speedy trial claim).

The Barker test requires the court to consider: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192. Of these factors, length of delay is the least important and prejudice is the most important. See Schaaf, 169 Ariz. at 327, 819 P.2d at 913; Olson, 146 Ariz. at 339, 705 P.2d at 1390.

In his August 1989 letter, Defendant made a request for sentencing, although arguably the request was conditioned on his receipt of concurrent sentences, something he was not guaranteed by law or plea agreement. If the length of the delay is calculated from August 1989 -- and whether it is or not is for the trial

court to decide -- twenty-three months lapsed between Defendant's request for sentencing and his extradition to Arizona. This delay is long enough to trigger a Barker inquiry. See Doggett v. United States, ___ U.S. ___, ___ n.1, 112 S.Ct. 2686, 2691 n.1, 120 L.Ed.2d 520 (1992) ("Depending on the nature of the charges, the lower courts have generally found post[-]accusation delay 'presumptively prejudicial' at least as it approaches one year.").

The cause of the delay requires closer scrutiny. The State argues that Defendant's flight before sentencing was the cause of the delay. This argument over-simplifies the causation issue. Although Defendant was the cause of delay while he remained a fugitive, once Arizona authorities knew Defendant was incarcerated in New York and was

requesting in absentia sentencing in Arizona, any ensuing delay might have been caused by the State, not Defendant. See Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 490, 93 S.Ct. 1123, 1127, 35 L.Ed.2d 443 (1973) (after defendant made repeated demands for trial, the state courts had an opportunity to consider the merits of his speedy trial claim); Moody, 843 P.2d at 1364 n.13 (court will use Barker analysis even though part of the delay was attributable to defendant's own actions). Any delay caused by the State is cognizable for sixth amendment purposes. See Barker, 407 U.S. at 531, 92 S.Ct. at 2192 ("A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must

rest with the government rather than with the defendant.").

The final Barker factor, prejudice to Defendant, is impossible to analyze based on the present record. The Defendant in his responsive brief, and the trial court in its order of dismissal, made reference to the fact that Defendant was prejudiced because the Arizona hold caused New York to deny Defendant's request for temporary release. However, it appears that denial of that request was made less than one month after Defendant made his request for sentencing. While denial of release may have been attributable to the detainer itself, it is not clear that it was attributable to the State's delay in acting on that detainer. The trial court also referred to Defendant being "prejudiced during the undue delay regarding the terms and conditions of the

New York confinement." The existence of such prejudice during confinement is not supported by the present record, but may be explored on remand.

In the order of dismissal, the trial court mentioned that Defendant had been "deprived of his right under Arizona law and his plea agreement to seek a concurrent sentence." Whether this is a sufficient showing of prejudice under the sixth amendment can be explored on remand.

V.

We reverse the order dismissing the indictment. We remand the case to the trial court with directions to consider Defendant's claim that his constitutional right to speedy trial was violated.

GARBARINO, P.J., and McGREGOR, J., concur.

APPENDIX B

Supreme Court

State of Arizona

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

Telephone: (602) 542-9396

August 1, 1994

RE: STATE OF ARIZONA vs. CHRISTOPHER R. BURKETT
Supreme Court No. CR-93-0481-PR
Court of Appeals No. 1 CA-CR 92-0317
Maricopa County No. CR 87-01943

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 28, 1994, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

ORDERED: Appellant's Cross Petition for Review = DENIED.

Justice Martone voted to grant review of Appellant's Cross Petition.

Record returned to Court of Appeals, Division One, Phoenix, this 1st day of August, 1994.

NOEL K. DESSAINT, Clerk

[Service omitted]

Supreme Court, U.S.
FILED
DEC 20 1994
OFFICE OF THE CLERK

No. 94-801

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF ARIZONA,

Petitioner,

-vs-

CHRISTOPHER R. BURKETT,

Respondent.

ON WRIT OF CERTIORARI TO

THE ARIZONA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

CAROL A. CARRIGAN
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Counsel for **RESPONDENT**

SUMMARY OF ARGUMENT

This Court has no jurisdiction under 28 U.S.C. § 1257(a) because there is no case or controversy; the question presented by the Petitioner is unripe, and the decision of the Arizona Court of Appeals was based upon adequate and independent state grounds. In all events, the speedy trial provisions of the Sixth Amendment should apply through sentencing.

ARGUMENT

The Arizona Court of Appeals held below that a citizen's right to a speedy trial applies through to the sentencing stage of proceedings, pursuant to the Sixth Amendment *and* pursuant to Article 2, § 24 of the Arizona Constitution.[1] Petition, Appendix A at page 21a.

The State of Arizona has petitioned this Court for certiorari asserting that jurisdiction lies under 28 U.S.C. § 1257(a), which gives this Court jurisdiction ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Specifically,

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[1] Article 2 § 24 of the Arizona Constitution provides:
"*In criminal prosecutions, the accused shall have the right* to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, *to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed*, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed (Emphasis added)."

Arizona claims the Court is presented with a ripe Sixth Amendment question. Petition, at pages 2 and 3.

Respondent disagrees. Burkett submits this Court has no jurisdiction because there is no genuine case or controversy; the question presented by the Petitioner is unripe; and because the decision of the Arizona Court of Appeals was based upon adequate and independent state grounds. However, in all events Burkett asserts the Sixth Amendment right to speedy trial extends through to sentencing.

Burkett made the assertion in the trial court that his right to a speedy trial carried through to sentencing; however, the trial court never reached that question. Petition, Appendix A, at page 17a. Rather, it dismissed the case on other grounds. Id. at pages 1a and 2a. Petitioner then appealed. The Arizona Court of Appeals reversed the trial court and found that the right to a speedy trial carried through to sentencing, pursuant to the Sixth Amendment *and* pursuant to Article 2, § 24 of the Arizona Constitution. Id. at page 21a. The case was therefore remanded to the trial court for a hearing to determine whether Burkett's speedy trial rights were violated by the more than two-year delay in his sentencing. Id. at pages 2a-3a. The Arizona Supreme Court later denied review, leaving as the final word in the matter the opinion of the Arizona Court of Appeals, which remanded to the trial court.

There is no case or controversy and the question is unripe.

Among other attributes, federal jurisdiction under Article III, Section 2 of the United States Constitution requires a federal

controversy. Although the Arizona Court of Appeals found the Sixth Amendment right to speedy trial carries through to sentencing, there is no controversy here because no court has found that Burkett's Sixth Amendment rights have been violated. Until there is a hearing, then, no controversy will exist.

Burkett therefore asserts that Arizona is requesting a mere advisory opinion on a hypothetical question, which is beyond the jurisdiction of the federal courts, United States Nat. Bank of Oregon v. Independent Ins. Agents of America, ____ U.S. ____, 113 S.Ct. 2173 (1993); Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

Burkett also submits the case is unripe. The ripeness doctrine shuns premature judicial involvement by the Court in abstract disagreements premised on future contingencies which may not occur as anticipated, or may not come to pass at all, Reno v. Catholic Social Services, Inc., ____ U.S. ____, 113 S.Ct. 2485 (1993); Flast v. Cohen, 392 U.S. 83, 97 (1975). The trial court might determine Burkett's rights were not violated, or, if violated, that he suffered no prejudice and is not entitled to relief. Until there is a decision on the concrete rights of these parties, the matter is unripe for resolution.

The case was decided on adequate independent state grounds.

This Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's determination rests on an adequate and independent state ground, Sochor v. Florida, ____ U.S. ____, 112 S.Ct. 2114, 2119 (1992); Michigan v. Long, 463 U.S. 1032, 1041 (1983); Herb v. Pitcairn, 324

U.S. 117, 125-126 (1945). Burkett asserts the Arizona Court of Appeals expressly stated an adequate and independent state ground for its finding that the right to speedy trial carries through to sentencing: Article 2, § 24 of the Arizona Constitution. Petition, Appendix A at page 21a.

Even though the Arizona Court of Appeals found within the Sixth Amendment's speedy trial clause a right to a speedy sentence, its equal reliance on the Arizona Constitution's own speedy trial provisions constitutes adequate and independent state grounds that ought to prevent this Court from granting certiorari.

The Sixth Amendment extends to sentencing.

Burkett asserts the Sixth Amendment right to speedy trial extends through to sentencing. The Arizona Court of Appeals joined the great majority of jurisdictions when it agreed. Petition, Appendix A, at pages 17a-19a. The Arizona Court of Appeals adopted in this case the delay-of-trial test of Barker v. Wingo, 407 U.S. 514 (1972) (e.g., length of delay, reason for delay, defendant's assertion of right and prejudice to defendant) to screen claims of Sixth Amendment violations at sentencing.

The Barker factors have worked well for almost a quarter century. Their application to the last stage of the criminal proceeding, the sentencing, is a logical extension of what has been the law for a generation. Further, recognition of the Sixth Amendment's application to sentencing will fashion a useful device for the judicial toolbox, the better to administer congested courts and oversee sometimes recalcitrant prosecutors.

The Arizona Court of Appeals noted that a more than two-year delay occurred in Burkett's sentencing from the time when Arizona learned Burkett was in custody in New York State on an unrelated matter. Petition, Appendix A, at pages 2a-3a. Two years. For almost forty years, this Court has assumed arguendo that the ". . . sentence is part of the trial for purposes of the Sixth Amendment." Pollard v. United States, 352 U.S. 354, 361 (1957).

If the Court is inclined to grant certiorari, it is respectfully submitted it should do so in order to bring sentencing patently within the protections of the speedy trial clause of the Sixth Amendment.

CONCLUSION

As there appears to be no federal jurisdiction in this case, Burkett asks that Arizona's petition for a writ of certiorari be denied.

Dated this 20th day of December, 1994.

Respectfully submitted,

By

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Counsel for **RESPONDENT**
State Bar No. 004252

CERTIFICATE OF SERVICE

CAROL A. CARRIGAN states the following under oath:

I served Gerald R. Grant and Diane E.W. Gunnels, the attorneys for the petitioner the State of Arizona, with one copy of the Brief in Opposition by delivering the copies to their office, on 20th day of December, 1994. They represent the only party required to be served.

By _____

CAROL A. CARRIGAN
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Subscribed and sworn to before me this 20th day of December, 1994.

_____
Notary Public

My Commission Expires:

My Commission Expires Aug. 1, 1998